

## CHAPTER 3

### PROCUREMENT REQUIREMENTS

#### OVERVIEW

This chapter provides guidance to TSEP recipients regarding state requirements that govern the procurement of supplies, equipment, construction, and professional or other services with TSEP funds. **The principal focus of this chapter is the procedures required for selection of consultants to provide project management and engineering services.** The procedures required for the selection of contractors for public facilities construction are discussed in detail in Chapter 8, Public Facilities Construction Management.

Local officials should carefully review this chapter before entering into any agreements to purchase equipment or materials or to retain the services of a consultant or contractor. In addition, **all contracts to be paid for in part by TSEP funds must be submitted to MDOC for review and approval, prior to execution.** In addition, MDOC has available a technical assistance manual called “Building It Right,” which provides considerable detail regarding the selection of contractors for public facilities projects.

#### A. APPLICABLE STATE REQUIREMENTS

Conflict of Interest (Sections 2-2-201, 7-3-4367, 7-5-2106, and 7-5-4109, MCA) set out statutory requirements governing conflicts of interest by state or local officials and employees.

County Contracts (Section 7-5-2301 to 2308, MCA) sets out procedures for procurement by county government.

Municipal Contracts and Franchises (Section 7-5-4301 to 4308, MCA) describe the requirements for awarding of contracts by Montana cities and towns.

Architectural, Engineering, and Land Surveying Services (Section 18-8-201 to 212, MCA). This law establishes a qualifications-based selection procedure for architectural, engineering and surveying services costing \$20,000 or more that are funded by state and local public agencies (state agencies, local governments, school districts, special districts or authorities of local governments).

Rules of Conduct for Public Officials and Employees (Sections 2-2-104, MCA). These sections of Montana law set out a code of ethics for state and local officials and employees.

#### Montana Public Notice Requirements

Requirements for publication of notices for **municipalities** are set forth in Section 7-1-4127, MCA, Publication of Notice.

Requirements for publication of notices for **counties** are set forth in Section 7-1-2121, MCA, Publication and Content of Notice.

Grant recipients should be aware that Section 18-8-203, MCA, dealing with the procurement of architectural, engineering, and land surveying services, states that units of state and local government must publish a notice of their need for these services. However, because section 18-8-203, MCA does not establish a specific time frame or method of publication, it should be read in conjunction with sections 7-1-4127 or 7-1-2121, MCA. A copy of Section 7-1-4127 and 7-1-2121, MCA, is provided in Exhibit 3-A.

In all cases, **MDOC strongly recommends that recipients publish their notices in both local and appropriate regional newspapers.** Broad advertisement and solicitation for goods and services will help assure greater competition, lower cost, and a better selection of choices for the local government.

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#### Summary of Notice Requirements in Montana Statutes

Statute	Title of Statute	Counties	Municipalities	Notes
18-8-203, MCA	<i>Public notice of agency requirement</i>	X	X	Sets forth requirements regarding when agencies must publish notice for professional services.
7-1-4127, MCA	<i>Publication of notice</i>		X	Notice published <b>twice</b> , at least 6 days apart. Sets forth other requirements related to type of media and newspapers acceptable for publication purposes.
7-1-2121, MCA	<i>Publication and content of notice</i>	X		Notice published <b>twice</b> , at least 6 days apart. Sets forth other requirements related to type of media and newspapers acceptable for publication purposes.

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## B. TSEP RECIPIENT RESPONSIBILITIES

The Montana statutes cited above provide the basic framework of requirements for the procurement of all supplies, equipment, construction, and services using TSEP funds by local governments. The key requirements are summarized in the following sections. Local officials

and staff or TSEP project consultants should always consult the actual text of current Montana law regarding applicable state procurement requirements. If local officials have any questions regarding these requirements they should contact MDOC for guidance.

1. Code of Ethics and Conflicts of Interest

The Montana Legislature has established a Code of Ethics for all officers and employees of State and local government. Sections 2-2-104, 2-2-201, 7-3-4367, 7-5-2106, and 7-5-4109, MCA, set out policy on conflicts of interest for state and local public officials and employees. A copy of the pertinent sections of Montana law is included in Exhibit 3-B.

2. Procurement Procedures

a. Full and Open Competition

**All procurement transactions must be conducted in a manner that provides full and open competition. Procurement procedures should avoid any provisions that would unnecessarily restrict or eliminate competition.** Some of the procedures considered to be too restrictive include:

- placing unreasonable requirements on firms in order for them to qualify to do business,
- requiring unnecessary experience and excessive bonding,
- noncompetitive pricing practices between firms or between affiliated companies,
- noncompetitive awards to consultants that are on retainer contracts,
- organizational conflicts of interest,
- specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance of other relevant requirements of the procurement, and
- any arbitrary action in the procurement process.

b. Geographic Preference

TSEP recipients should conduct procurement in a manner that avoids the use of local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Montana law mandates or encourages geographic preference. When contracting for engineering services, geographic location may be a selection criterion provided its application leaves an adequate number of qualified firms to compete for the contract.

For example, including criteria in a request for proposals such as "knowledge of community" or "experience with community" would be considered to "unduly restrict competition" and are discouraged.

c. Written Selection Procedures

**TSEP recipients should have written selection procedures** that provide, at a minimum, that all solicitations:

- (1) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. The description should not contain features that unnecessarily restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, describe those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used as a means to define the performance or other salient requirements of the procurement. The specific features of the named brand that must be met by responding firms must be clearly stated.
- (2) Identify all requirements that the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

## C. Selecting The Method Of Procurement

TSEP recipients should select the most appropriate method based upon the recipient's needs and the nature of the services required. Of special concern is MDOC's current procurement policy related to grant management services. In 1998, MDOC adopted a policy that grant administration services (consulting services) for CDBG, HOME and TSEP grants are procured using the following procedures:

- a. Requests for Proposals (RFPs) are required for any services over \$100,000 and are recommended for procurement actions under \$100,000 that are complex and/or where qualifications and desired work products cannot easily be handled by telephone rate quotations.
- b. "Small purchase" procedures can be used where the procurement will not cost more than \$100,000 in the aggregate, (see Procurement by "Small Purchase" Procedures below).
- c. If a local government's procurement policy is more restrictive than MDOC procedures, the local government's policy will govern the procurement procedures to be followed.

However, the use of "small purchase" procedures are not required for the procurement of grant administration services if all of the following are met:

1. there is a long-term partnerships between a local government and a for-profit or non-profit partner,
2. the partnership is based upon a current legal relationship (signed contract),
3. the partner is managing the grant funds,
4. the local government does not have the staffing capability to manage the grant, and
5. the relationship will continue indefinitely following project closeout.

An example of a "long-term partnership" would include situations where local governments have originally procured through appropriate methods the services of a for-profit or non-profit partner to provide services such as grant writing and grant administration and will continue to provide those services indefinitely following the closeout of the project. While this type of partnership is most likely to apply to multi-jurisdictional organizations such as Human Resources Development Councils (HRDC) or economic development corporations, it could also apply to for-profit consultants that maintain an ongoing partnership with a local government to provide those services.

The following is a summary of four basic selection alternatives and the requirements associated with them. If local officials have any questions regarding these requirements they should consult the MDOC TSEP staff assigned as liaison for their project. The four methods include:

1. Procurement by "Small Purchase" Procedures

The “small purchase” method of procurement is generally used to purchase supplies, equipment, or other property that do not require sealed bids and for professional services that do not require competitive proposals. This procedure is intended for relatively simple and informal procurement of services, supplies, or other property that cost less than the amounts specified in Montana law for competitive bidding requirements. (These amounts differ for state, county, and municipal governments.)

If the small purchase procurement procedure is used, price or rate quotations should be solicited from an adequate number of qualified sources (three to five). Written price quotations are the preferable form of documentation. When price quotes are obtained orally, written supportive documentation must be maintained in local TSEP files, such as detailed notes describing telephone contacts. Local governments should record the rate or quote along with other identifying information (name, address, and telephone number) and document the questions asked.

**When procuring a grant administrator, the small purchase procurement procedure takes the form of a “limited solicitation.” Rather than simply obtaining a price quote, the local government should request proposals from qualified vendors (minimum of three) of their choice and then select the consultant based upon qualifications and what services it can offer.** In this situation, price can be a factor in the selection of the grant administrator. Past experience with a particular consultant may also play a substantial role in the selection of the consultant. The limited solicitation process would be very similar to the Request for Proposal (RFP) process, but the RFP would not need to be advertised. The local government would still need to have a written procurement procedure and stated evaluation criteria.

**However, the local government may choose to simply obtain a price quote and use that as the only selection criteria for a grant administrator.** The local government would need to provide a very detailed scope of work to the vendors solicited, specifically defining what services are required and what will be expected from the grant administrator.

In addition, it has been noted by the MDOC staff that some local governments have chosen to include grant writing/grant administration as one of the services to be provided by the project engineer, and not going through a separate procurement for a grant administrator. While this is not prohibited, it does limit the pool of potential grant administrators that the local government would evaluate. There are several highly qualified consultants that provide grant administration services that are not engineers and would not have the opportunity to submit a proposal for their services.

**The Department recommends that if the local government chooses to procure a grant administrator at the same time it procures an engineer, it should at least include in the advertisement that grant administration services, in addition to engineering services, are being sought. The RFP should make it clear that a consultant may submit a proposal just for the grant administration services; MDOC also recommends that the advertisement state this also.** Keep in mind that if the local government chooses to use the project engineer for grant administration, the local government will need to play an even more active role in the administration of the grant, since the engineer/grant administrator (same firm) cannot be reviewing and signing off on its own work and claims for payment.

Under Montana law (18-8-201, MCA), the selection of a consultant for architectural, engineering, or surveying services requires a competitive solicitation and negotiation process for projects for which the fees are estimated to exceed \$20,000. **For other professional services, such as grant administrators, legal, appraisal, or audit services, MDOC recommends using a competitive solicitation and negotiation process using an RFP regardless of the amount, since this process can help to ensure that the local government procures a consultant that will be best qualified and not just the least cost.**

**Regardless of the method used to obtain a grant administrator, the local government should provide information to MDOC in advance about how they intend to procure, or how the grant administrator was procured, if TSEP funds will be used to pay these services. The information submitted should include a list of vendors to be solicited, a copy of any advertisements, a copy of the request for proposals, or the information detailing the scope of work if price is the only consideration.**

## 2. Procurement by Competitive Sealed Bid

**Competitive sealed bidding is the standard procurement process followed for construction activities.** Chapter 8, Construction Management, includes a detailed step-by-step discussion of the procedures involved in selecting a construction contractor and the requirements that are applicable to TSEP-funded construction contracts.

TSEP recipients should refer to the applicable provisions of Montana law for advertising requirements (Section 7-5-2301, MCA for county governments and Section 7-5-4302, MCA for municipalities) to determine when the competitive sealed bid method must be used. County water and sewer districts must comply with the statutory bidding requirements for counties.

Procurement by competitive sealed bids (formal advertising) is used when the following conditions exist:

- a. a complete, adequate and realistic specification or purchase description is available;
- b. two or more responsible suppliers are willing and able to compete effectively for the business;
- c. the procurement lends itself to a firm fixed-price contract (a specified price to be paid when the items or services are delivered); and
- d. selection of the successful bidder can appropriately be made principally on the basis of price.

Bids are publicly solicited (advertised in newspapers) and kept in confidence until there is a public bid opening. A firm-fixed price contract is awarded to the responsible bidder whose bid, conforming to all material terms and conditions of the invitation for bids, is lowest in price. When using formal advertising, the following requirements apply:

- a. The invitation for the bids must be publicly advertised and bids must be solicited from an adequate number of known suppliers or contractors, providing them sufficient time prior to the date set for opening the bids;
- b. The invitation for bids, including specifications and attachments must clearly describe the items or services required in order for the bidders to properly respond.
- c. All bids must be opened publicly at the time and place stated in the invitation for bids.
- d. A firm-fixed price contract award must be made in writing to the lowest responsive and responsible bidder.
- e. Any or all bids may be rejected if there is a sound documented reason.

### 3. Procurement by Sole Source

**Sole source procurement is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources competition**

**is determined to be inadequate.** The only circumstances under which a contract funded with TSEP monies may be awarded by sole source procurement are as follows:

- a. sole source procurement would be permissible under Montana law; and
- b. the items or services required are available only from one source;
- c. a public emergency exists such that the urgency will not permit a delay beyond the time needed to employ one of the other authorized procurement methods described above; or
- d. after solicitation from a number of sources, competition is determined to be inadequate.

The fact that a contractor is currently performing other consultant services for the TSEP recipient is not, by itself, an adequate justification for a sole source contract award. **In all cases, sole source procurement that will involve TSEP funds must have prior approval from MDOC.**

#### 4. Procurement by Competitive Proposals

The phrase "procurement by competitive proposals" is often used interchangeably with the frequently used term "competitive negotiation." This method of procurement is generally used when conditions are not appropriate for the use of sealed bids.

**Under Montana law (18-8-201, MCA), the selection of a consultant for architectural, engineering, or surveying services requires a competitive solicitation and negotiation process for projects for which the fees are estimated to exceed \$20,000.** The law applies to state agencies, local governments, special districts, or any other entity or authority of local government, in corporate form or otherwise. It therefore applies to all TSEP recipients.

In situations where the engineering services are being provided by a governmental agency, such as the Indian Health Services, and is being provided as a "in-kind" service for a project, a competitive solicitation and negotiation process is not required.

**Although not required under most circumstances, procurement by competitive proposals is the recommended procurement procedure for retaining a grant administrator.** Procuring professional services using competitive proposals is in your best interest, since it allows you to obtain the most qualified person for the job. In

addition, it has been noted by the MDOC staff that some local governments have chosen to include grant writing/grant administration as one of the services to be provided by the project engineer, and not going through a separate procurement for a grant administrator. While this is not prohibited, it does limit the pool of potential grant administrators that the local government would evaluate. There are several highly qualified consultants that provide grant administration that are not engineers and would not have the opportunity to submit a proposal for their services.

**The Department recommends that if the local government chooses to procure a grant administrator at the same time it procures an engineer, it should at least include in the advertisement that grant administration services, in addition to engineering services, are being sought. The RFP should make it clear that a consultant may submit a proposal just for the grant administration services; MDOC also recommends that the advertisement state this also.** Keep in mind that if the local government chooses to use the project engineer for grant administration, the local government will need to play an even more active role in the administration of the grant, since the engineer/grant administrator (same firm) cannot be reviewing and signing off on its own work and claims for payment.

Procurement by competitive proposals requires the contracting agency to publicly announce requirements for the services or project, to consider proposals from responding firms, and to negotiate a contract with the most qualified firm at a price the entity determines to be fair and reasonable. If an agreement cannot be reached with the top ranked firm, the law specifies that negotiations are formally terminated and the local government negotiates with the second ranked firm.

Because the retention of consultant services for engineering or project management is a major concern for most TSEP recipients during the start-up phase of their project, the following discussion will cover the issues involved in this method of procurement in greater detail. With competitive proposals, proposals are advertised and requested from several qualified sources. Procedures for competitive proposals require the following:

- a. Requests for proposals (RFP's) which describe the general scope of the services or work to be performed, and which identify all evaluation factors and their relative importance, must be publicized through advertisements and announcements.
- b. Proposals must be solicited from an adequate number of qualified sources (at least two). Any response to the RFP must be considered.

- c. TSEP recipients and sub-TSEP recipients must have a method for conducting technical evaluations of the proposals received according to the criteria specified in the RFP and for selecting awardees; and
- d. Awards must be made to the responsible firm whose proposal is most advantageous to the program, with the specified factors considered.

## **D. PREPARING A REQUEST FOR PROPOSALS (RFP)**

An RFP is a written announcement that invites consultants to compete for the provision of services to your local government. Although the RFP process may appear time consuming, taking the time to make sure that your community hires a competent engineer or other consultant will, in the long term, likely save money and prevent problems. The RFP should include:

- 1. the name of the local government issuing the RFP;
- 2. a brief description of the project including location, purpose, time frame, and present status;
- 3. a general description of the scope of the services to be provided by the consultant;
- 4. the amount budgeted for the proposed scope of services;
- 5. the method of payment to be used;
- 6. the time frame for performing the work, including any major milestones or deadlines involved;
- 7. information required of each respondent in order to make the selection, including consultant qualifications, related experience on similar projects, current and projected workloads, capability to meet time and budget requirements and identity and qualifications of professional personnel to be assigned to the project;
- 8. the methods and criteria to be used in evaluating the proposals, and the relative weight of each of the criteria;
- 9. the name and telephone number of a local person who can be contacted for further information regarding the RFP; and
- 10. directions for submitting a response to the RFP.

**The scope of work for the entire project should be included in the RFP. For instance, if you are primarily soliciting the services of an engineer to complete the planning and preliminary engineering for a project, but you may want to retain the engineer's services for the design and construction phases of the project, it should be specifically stated in the RFP and addressed by the responding firms.**

You should not go into precise detail about the scope of the services the consultant is expected to perform. You should be telling them what you want done, not precisely how to do it. You do not want the response to be just a repeat of your RFP. Allow the consultants to demonstrate their knowledge and experience by filling in the details of how they would approach the problem and the alternatives that you should consider.

The RFP should be concise and to the point, containing all of the important information needed for the firms to respond in a factual manner. However, do not overdo the RFP; include only the necessary information. A wordy or unclear RFP will unnecessarily increase the time each firm spends preparing their response and your time in reviewing the proposals. You should, however, be sure to specify any services or equipment the consultant will be expected to provide, such as requiring that they open a local office or provide secretarial or financial management services. These can significantly affect how the consultant will budget his or her time and resources. The RFP should also describe any unique problems involved in the project and any previous studies that would be available for their review.

TSEP recipients may want to consider including the amount budgeted for the services in the RFP. This may help a consultant decide whether to go to the effort of responding. Knowledge of the available budget will also help the consultant fit the proposal to your financial resources to make sure that time and resources are used most efficiently.

Your RFP should not only describe the criteria to be used in evaluating the proposals but also the relative weight attached to each. This is important for the consultant to better understand the priorities of your concerns and how to respond to them.

The directions for submitting the RFP should specify the date and time of the submittal deadline and the number of copies required. Since proposals are sometimes hand delivered, be sure to include an office address where someone will be available to accept them.

Your RFP should also include the names and phone numbers of people that will be available and knowledgeable enough to answer questions about the RFP. Do not just list the chief elected official if that person is not likely to be available during normal business hours.

Consultants interested in responding will usually contact you before they decide to submit a proposal. MDOC recommends that you be frank in answering the consultant's questions. Consultants should be allowed to review your TSEP application so that they can gain a better understanding of what your community hopes to accomplish through the project.

**Exhibits 3-C and 3-D are sample formats for RFP's for management and engineering services. Both provide only the outline for the content of an RFP; each must be carefully adapted to reflect the unique activities and considerations involved in your TSEP project.**

It is important to remember that if the original RFP does not cover all of the services that are needed to complete the project, you may have to go through the RFP selection procedure again. Any additional engineering services not indicated in the original RFP must be procured with a separate RFP if the cost exceeds \$20,000. For example, when you hire an engineering firm to prepare just the facility plan (planning phase), and then later you decide to re-hire the same firm for the final design and construction phase, a new RFP is required to be advertised and the selection procedures must be repeated. Competitive selection procedures must be used to procure the new services.

The requirements of the RFP process are sometimes confused with the final contract for services when hiring a consultant or engineering firm. The owner may reserve the right to procure services from another firm, in the event that the original consultant/engineering firm's work is unsatisfactory, even though the original RFP included the scope of services for the entire project. For example, the local government/owner may choose to procure services with another consultant/engineering firm for final design if work performed during the preliminary planning phase does not meet the owners approval or is not consistent with the contract for services agreement. The local government/owner would need to advertise a new RFP and repeat the selection procedures.

## **E. SOLICITING PROPOSALS**

TSEP recipients must be able to document that proposals were solicited from an adequate number of qualified sources and that full and open competition took place prior to its selection of a consultant. Encouraging adequate competition is of obvious interest and benefit to TSEP recipients in terms of retaining the most qualified consultant at a reasonable cost. The more responses, the better the community's chance of hiring the best qualified firm.

At a minimum, the local government must advertise the RFP at least twice in the newspaper used for its regular legal advertising. MDOC's concern in reviewing local procurement procedures is that the TSEP recipient be able to demonstrate reasonable efforts to solicit from an adequate number of qualified sources. If the RFP is advertised in a small town newspaper with only local distribution, the effort may be open to question. Therefore, **MDOC strongly recommends that TSEP recipients advertise at least once in a newspaper with regional distribution in their area of the State, in addition to any local advertising.**

**Advertising the local government's request for proposals does not mean that the entire text of the RFP must be included in a legal advertisement.** The advertisement can briefly announce that the community is requesting proposals and that a copy of the detailed RFP is available upon request. (See example in Exhibit 3-E.) This approach, in lieu of publishing the entire text of the RFP, might substantially reduce advertising costs. However, it will mean that the grant recipient must allow additional time for persons or firms to request and receive a copy of the RFP and to respond.

You should send copies of the RFP to firms that have previously indicated an interest in submitting a proposal. You can also contact other firms directly and ask them to submit proposals. By retaining copies of the letters sent to these firms you will have clear documentation of your efforts to invite competitive proposals, in the event that you receive a limited number of responses.

**MDOC recommends that you allow at least four weeks for responses to your RFP.** MDOC considers three weeks the very minimum to allow for a reasonable time for a firm to prepare an adequate response. Less time for response would unnecessarily restrict competition. If time is too limited, some very qualified potential respondents may either be eliminated or may not be allowed sufficient time to prepare a quality proposal.

## **F. PRIOR COMMITMENTS TO CONSULTANTS**

In many cases, a TSEP recipient will have already worked with a consultant or engineer preparing the original application. However, the community must still go through the RFP selection process unless it can clearly document that the original RFP process met all state procurement requirements and was sufficiently detailed to describe the engineering or architectural services that will be compensated under the TSEP project budget. The original consultant may respond to the local government's RFP and it is perfectly legitimate to consider the consultant's prior performance when making the selection. The RFP process does not preclude you from hiring an engineer that has previously worked for you and who performed well. It does mean that you must give other qualified firms a reasonable opportunity to propose on a project.

In some cases, a community may receive a proposal for what is called a "loss leader" arrangement where the consultant offers to prepare or assist with a grant application at cut rates or for no cost in return for favorable consideration in the selection process for a grant administrator or engineer. Professional organizations consider this practice unethical because it deprives the client of the benefits that result from competition among competent professional consultants. Also, using an evaluation criterion such as "familiarity with project or community," for example, would be considered as restricting competition because it would

favor a consultant or firm that had worked with the community previously and possibly discourage competition by other consultants.

MDOC generally discourages the use of RFP's that consolidate grant application preparation and engineering or grant administration services. The practical effect may often result in reduced competition for both grant preparation and engineering or grant administration services. For example, an engineering firm or grant writing consultant may feel ethically constrained from preparing an application for another community if it already is working on behalf of another. If these services are procured separately, the grant recipient gains the benefit of increased competition by competent professionals for the needed services. Both TSEP applicants and TSEP recipients have everything to gain and nothing to lose by encouraging maximum free and open competition by consultants.

## **G. REVIEWING PROPOSALS AND SELECTING THE CONSULTANT**

The local government should appoint a committee of three to five people to review the responses to the RFP. Members of the committee should be familiar with the RFP and work to be accomplished through the contract. Try to include a person who is very familiar with the problems of the public facility, such as a public works supervisor. It may also be helpful to have a member of the committee with technical knowledge or experience appropriate to the project.

The committee should try to keep to a minimum the time between the proposal deadline, evaluation of the proposals, and the final selection of the consultant. Forty-five days is a reasonable time period.

TSEP recipients should have a method for conducting technical evaluations of the proposals received and for selecting awardees. TSEP recipients should rank the proposals according to the evaluation factors listed in their RFP and assign points to each, based on a pre-established number of points for each criteria which is consistent with their relative importance as described in the RFP. **Under state law, the ranking criteria for selection of engineers, architects and surveyors must include, at a minimum:**

1. the qualifications of the professional personnel to be assigned to the project;
2. the consultant's capability to meet time and project budget requirements;
3. location;
4. present and projected workloads;
5. related experience on similar projects; and
6. recent and current work for the entity issuing the RFP.

An effective way to handle the ranking of the responses to your RFP is to put together a matrix with your evaluation criteria on one side of a sheet of paper and the names of the consultants responding on the top. Each criterion is assigned a new point value. Each proposal is reviewed, scored, and point scores added up. The scores you finally assign to the respondents should be retained as part of your record of the rationale you used to select the consultant. The matrix can be used twice: once, to screen the written proposals to select respondents to be interviewed and again, to record the ranking of those chosen for an interview. An example of possible selection criteria, a sample evaluation form, and a matrix that incorporates the required ranking criteria is included in Exhibit 3-F.

In making your selection, you should remember to distinguish between the overall firm and the person(s) that will actually be assigned to your project. **Be sure to carefully consider the qualifications of the person the firm intends to assign to your project.** The fact that a firm has an excellent reputation does not guarantee the competence of the person who will be assigned to work with you.

It is not necessary to interview a large number of consultants to demonstrate adequate competition. Responding to an RFP can involve a significant amount of time and expense for responding firms. It would be unfair to ask a consultant to also take the time and to incur travel expenses if they are unlikely to be selected. If you receive a large number of responses, try to limit the number of consultants to be personally interviewed to the top two or three firms (five should be the maximum), based on their written proposals and reference checks. If you have determined that some proposals are weaker than others, these should be eliminated from consideration. **At a minimum, local officials should interview at least two of the firms or persons that submitted responses before making a selection, in order to demonstrate that adequate competition took place.** Do not pre-select a qualified firm and then invite others to interview so that an appearance of competition is created. Good, qualified firms may not respond to your RFP the next time you solicit proposals for a public facilities project.

The review committee should interview the finalists separately. Do not allow other firms to sit in on any firm's presentation. The consultants should describe their qualifications, the manner in which they would handle the work tasks, and respond to any questions regarding the content of their proposals. The individual who will be principally responsible for doing the work on your project day-to-day should be present at the interview. Allow adequate time for formal presentations and questions from the committee. The Montana Technical Council considers an hour a reasonable minimum.

Standard questions should be asked during the interview to allow comparison of the responses. Ask the same questions of each firm. Provide each person on the selection committee a sheet listing the questions to be asked during the interview. Each member of the selection committee should note the consultant's answer to each question, and should rate the answer using a predetermined scoring method.

After ranking the responses in order of their scores on the evaluation factors and checking references, the committee will make their recommendation. Once it has reached a final decision, the local government should notify all of the respondents of the results in writing, as soon as possible.

## H. CHECKING REFERENCES

**Before you make your final selection of a consultant, there is no step that is more important than to thoroughly check references.** Always request a list of prior clients, including their name, description of the work performed, address, and the name and phone number of a person to contact. A list of their most recent projects is usually best. You should contact several references for each respondent being considered. Some useful questions might be:

1. Were you satisfied with the quality and timeliness of the work?
2. Was the consultant knowledgeable about funding programs and related requirements?
3. Was the consultant willing and able to work closely and effectively with local staff?
4. Were the costs or charges reasonable in relation to the work actually performed?
5. Did you experience any problems that would discourage you from hiring them again?

Also check to see if the work done for these clients is similar to what you want the consultant to do. The ability to write a grant application, for example, does not mean that the same consultant has the capability to assist you with the management of a grant.

Sometimes the person or firm you are interested in will be a new firm with few, if any, client references. New, small firms can sometimes be just as good as well-established, large firms, so instead of asking for client references, you would ask for employer references.

MDOC TSEP staff may also be able to help you identify references for the finalists you are considering. The staff is familiar with several firms and may be able to refer you to other communities that have knowledge of the consultants you are considering.

**Checking references prior to selecting a consultant is the most important action you can take to avoid becoming involved with an unsatisfactory consultant.**

## I. MDOC REVIEW OF PROCUREMENT PROCEDURES

Before the community enters into a contract, MDOC recommends that local officials send their assigned TSEP liaison a copy of the advertisement used to publicize the RFP, a copy of the RFP itself, and a summary of the procedures followed to select the consultant, including copies of the evaluation forms used to compare the responses. MDOC can then review the procurement practices used by the TSEP recipient to assure that they are in compliance with state requirements.

TSEP recipients should retain all documentation in their TSEP project files to demonstrate the basis for selection or rejection of consultants, consultant qualifications, contract specifications, and scope of work.

When a grant recipient receives only one response to a competitive solicitation, the procurement process may be reviewed by MDOC to determine whether it was unduly restrictive or tailored to a particular contractor or supplier. The burden of proof will be on the local government to demonstrate that it made reasonable efforts to assure maximum open and free competition and that its procurement procedures did not have the effect of unnecessarily restricting competition.

## **J. CONTRACT PRICING AND METHOD OF COMPENSATION**

Once the local government has made the final selection of a consultant, the next step is to negotiate the terms for compensation for the consultant's services at a "fair and reasonable" cost. Montana's law in regard to selection of architects, engineers, and surveyors, requires the local government to "negotiate a contract with the most qualified firm ... at a price which the agency determines to be fair and reasonable."

A response to an RFP should not be confused with a competitive bid. A bid is an estimate of cost in response to detailed specifications such as for construction projects where selection can be made principally on the basis of price. A response to an RFP in the competitive proposal process is a description of how a consultant proposes to approach solving your problem. The main focus in selecting the consultant is to evaluate the quality of the proposal and the consultant's "demonstrated competence and qualifications for the type of professional services required." **Selection is based on a consultant's qualifications, not on the basis of cost. Specific costs should only be discussed after the consultant has been selected.**

Communities should not choose an engineer only on the basis of cost. It is well worth spending a little extra to get a qualified engineer who will design a sound project that will provide cost-effective service for years to come.

TSEP recipients can consider comparative prices in the area for similar services to determine if proposed costs are "fair and reasonable." If the local government and the selected respondent cannot come to agreement on the scope of services and a mutually satisfactory fee, local officials should formally terminate the negotiations in writing and repeat the process of negotiating a scope of services and negotiating terms with the second-ranked respondent.

Consultant compensation is typically on the basis of a fixed price (a specified price to be paid when the product or services are delivered and accepted) or cost-reimbursement (costs are reimbursed as costs are incurred). **However, the only means of compensating consultants when TSEP funds will be used in whole or part to pay for those services is a cost reimbursable contract with a specified ceiling.**

With this type of contract, consultants are paid on an hourly basis not to exceed a specified amount, and profit is included in the hourly charges. Contracts must specify the hourly rate that will be charged, scope of services, and the ceiling for charges. In order to be eligible for TSEP reimbursement, contractors will be required to submit itemized invoices describing the services furnished, number of hours worked to accomplish each item, amount being billed for each item, a description of any other eligible expenses incurred during the billing period, and the total amount being billed. (See Exhibit 3-J for an example of a consultant's invoice.)

**Under no circumstances, is a percentage of construction costs (contingent fees) method of compensation allowable for any publicly funded contract. The "costs plus a percentage of costs" system of compensation is invalid under Montana law (Section 18-2-314, MCA).**

When negotiating payment terms, ask the consultant to explain the firm's estimated fee. Make sure you understand exactly what services will be provided. Is there a distinction between basic services and additional services? What circumstances could significantly change the estimate?

One consideration in negotiating payment terms is whether the terms provide for adequate control of the consultant's performance. Most consultants will prefer to receive payments in installments during the term of the project, rather than in one lump sum at the end of work activities. However, remember that payment must be based on services actually provided and the hourly rate of those that performed those services. Whenever possible, the grant recipient should assure that reimbursement is tied to the accomplishment of measurable objectives, such as key tasks or milestones in the scope of services or implementation schedule, in order to give the local government adequate control over contractor performance.

In negotiating payment terms for management services contracts, communities can provide for a retainage or holdback of a percentage of the contract funds (often about five percent) pending completion of conditional project closeout and the resolution of any monitoring findings which may be related to the consultant's performance. For public facilities, the final

payment of the engineering fee could be retained until the "as built" construction drawings have been submitted to the proper authorities and, if applicable, an operation and maintenance manual has been provided to the TSEP recipient and approved by the Department of Environmental Quality.

## K. PREPARING THE CONTRACT

The grant recipient's negotiation with the selected consultant will include the scope of services, timetable, contract cost, and payment terms. In most cases, the consultant will prepare a draft scope of services based on the proposal submitted in response to the RFP. This should include detailed descriptions of the services to be provided, along with a work schedule indicating the time line for completion of the more significant tasks, and identify the products or services to be provided. (Grant recipients negotiating scopes of services for project management can review the sample management plans in Exhibits 1 -B and 1 -C, Chapter 1, to get an idea of the activities that can be included in a scope of services.)

The community should insist that **any "understanding" between the consultant and the local government should be written into the contract.** "Gentlemen's agreements" can cause problems, even when involving apparently minor issues. The more time that is spent on describing who will be doing what, when, and for what fee, the smoother relations will be later on. Several points that should be clarified in the contract to protect the community's interests are:

1. State that only those key individuals who are identified in the firm's proposal for specific tasks are permitted to charge their time and expenses to the job. This should not apply to clerical and support staff whose costs were not specified in the consultant's original proposal.
2. All commitments stated in the contract must be honored unless changes are approved in writing.
3. It is important that the contract allow a fair and reasonable profit for the consultant. The basis for this could be previous experience, contacts with other municipalities, or published professional guidelines.

Preparation of the contract itself is relatively simple once these issues have been agreed upon. MDOC has prepared a sample professional services agreement which includes the standard "boilerplate" language used in such contracts and the clauses required for TSEP-funded contracts (Exhibit 3-G). **It is the TSEP recipient's responsibility to include provisions related to all applicable TSEP requirements in any contract or agreement**

**through which TSEP funds are passed on to a contractor or subcontractor.** Exhibit 3-I is a checklist of required clauses for professional services contracts.

Exhibit 3-H may be used by engineers as supplemental conditions to their standard contracts for professional services, if they prefer to use their regular contract format. In both sample formats, the required clauses have been noted with an asterisk. These required clauses cover issues such as procedures dealing with breach of contract and termination, patents and copyrights, and access to and retention of records. The grant recipient's attorney should be involved in the preparation of the contract to assure that all applicable requirements have been addressed and that the community's interests are represented.

**The draft contract must be submitted to MDOC for review prior to execution to make sure that all required state contract conditions have been included.**

## **L. RECORD KEEPING REQUIREMENTS**

**All TSEP recipients must maintain adequate records for any procurement that will be funded with TSEP funds.** Regardless of the method of procurement used, TSEP recipients must develop and retain documentation to demonstrate their reasons for choosing the method of procurement, the basis for selection or rejection of consultants, consultant qualifications, contract specifications, and scope of work. This documentation should include copies of the RFP, legal advertisements, affidavits from newspapers verifying publication, and other related selection materials. TSEP procurement files must also document the basis for the contract or purchase price.

When a grant recipient receives only one response to a competitive solicitation, the procurement process may be reviewed by MDOC to determine whether it was unduly restrictive or tailored to a particular contractor or supplier. The burden of proof will be on the local government to demonstrate that it made reasonable efforts to assure maximum open and free competition and that its procurement procedures did not have the effect of restricting or eliminating competition.

Financial information in support of any contract payments must also be maintained. This documentation includes vouchers, invoices, contracts, checks, budget transfer memoranda, and other transaction documentation. The recipient must also be able to document that vouchers and invoices were reviewed to verify financial and contractual compliance before payment was made.

## **M. CONTRACT ADMINISTRATION AND SUPERVISION**

TSEP recipients should establish and maintain procedures to monitor contractor performance to ensure that they are performing in accordance with the scope of services, timetable, and any other terms and conditions specified in their contracts or purchase orders. Ongoing monitoring of the contractor's performance and progress in completing contracted work tasks will prevent problems which may affect the quality, timely completion, or cost of the contract for your overall TSEP project.

All payment requests must be carefully reviewed, before they are approved, to make sure that costs are reasonable and are consistent with the terms of your contract or purchase order, before they are approved. Local officials should require narrative progress reports with each billing. The consultant should be requested to report on each separate product specified in the budget. Billing should list hours spent on each budget category by employee classification. If you do not understand an item on an invoice or believe a charge is not adequately documented, you should contact your consultant and resolve the question before payment is approved.

Some communities have found that their relationship with a consultant goes more smoothly if a specific person, such as the mayor or clerk, is assigned to act as day-to-day liaison with the consultant and to review progress reports and requests for payment. A common frustration of consultants is that too often no one is available to give them direction or feedback on issues involving the project. Communication with the consultant can also be improved by having regular meetings with the town council or an advisory group to keep local officials and residents up to date on project progress and to invite their suggestions regarding any problems that might be encountered.

If grant recipients are encountering problems with nonperformance by a contractor they should contact MDOC for guidance. All contracts must include provisions for termination.

## SUMMARY: PROCUREMENT STANDARDS

1. All procurement of supplies, equipment, construction, and professional or other services must follow the procedures set out in Montana law.
2. There are four basic methods of procurement that can be used by TSEP recipients:
  - a. small purchase procedures;
  - b. competitive sealed bids (formal advertising) (See Chapter 8 for a detailed description of the required procedures);
  - c. noncompetitive (sole source) negotiation; and
  - d. competitive proposals and negotiation.
3. Requests for Proposals must be sufficiently detailed to clearly describe the services that will be performed.
4. **All contracts entered into by TSEP recipients must contain required clauses to assure compliance with all applicable State laws and regulations. All contracts must be reviewed and approved by MDOC before they are executed.**
5. TSEP recipients must retain written documentation regarding the procurement procedures used for each contract.
6. TSEP recipients should establish procedures to assure ongoing review of contractor performance and contract expenditures during the term of any TSEP-funded project.

## **CHAPTER 3**

### **EXHIBITS**

- 3-A Publication of Notice for Municipalities and Counties
- 3-B Rules of Conduct for Public Officials and Employees, and Conflict of Interest Statutes
- 3-C Sample Format for a RFP for Management Services
- 3-D Sample Format for a RFP for Engineering Services
- 3-E Sample Format for Advertising the Availability of a Request for Proposals (RFP)
- 3-F Sample Selection Criteria for Evaluating Consultant Proposals
- 3-G Sample Format for a Professional Services Contract
- 3-H Sample Format for Supplemental Conditions to Standard Architectural or Engineering Services Contracts
- 3-I Sample Checklist of Required Contract Clauses for Professional Service Contracts
- 3-J Example of a Consultant's Invoice